

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES,)	
COUNCIL 81, LOCAL 1607,)	
Petitioner,)	<u>U.L.P. No. 96-11-199</u>
)	
and)	
)	
NEW CASTLE COUNTY,)	
Respondent)	

BACKGROUND

The American Federation of State, County and Municipal Employees; Council 81, Local 1607 ("AFSCME" or "Union") is an employee organization within the meaning of Section 1302(h) of the Public Employment Relations Act ("PERA" or "Act"), 19 Del.C. Chapter 13 (1994), and the exclusive representative of certain of the County's employees within the meaning of Section 1302(i), of the Act. New Castle County is a public employer within the meaning of Section 1302(m), of the Act.

The instant unfair labor practice charge was filed on November 15, 1996. Although the complaint raises multiple issues, the sole issue addressed herein is whether the County violated its obligation under 19 Del.C. §1307(a)(5) by refusing to schedule the Finance Department grievance ("Grievance 94-08") for a Step Three hearing.

Section 1307(a)(5), provides:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except as to a discretionary subject.

A hearing was held on March 14, 1997, at which time the parties presented testimony and documentary evidence, including sixty one (61) exhibits, supporting their respective positions. Closing arguments were presented orally on March 27, 1997. The following opinion and decision results from the record thus compiled.

FACTS

In January, 1994, the regularly scheduled hours of work of employees in the Assessment Division of the County's Finance Department were either 8:00 a.m. to 4:00 p.m., 8:30 a.m. to 4:30 p.m., or 9:00 a.m. to 5:00 p.m. By memo dated January 6, 1994, Director of Finance, Anne Nutter, directed that effective March 1, 1994, the regularly scheduled hours for all employees would be 9:00 a.m. to 5:00 p.m.

On January 14, 1994, the Union filed a system-wide grievance, Grievance 94-08, which provides:

Finance Department has changed hours of employees without union approval.

Remedy: Return employees to previous work hours and follow the CBA. (Union Ex. No. 50)

On February 28, 1994, the County issued the Step One answer denying the grievance claiming that no violation of the collective bargaining agreement occurred. (Ibid.)

By memo dated March 7, 1994, to the County's Personnel Director, William Steele, the Union appealed the grievance to Step Two of the grievance procedure. (Union Ex. No. 8) The Step Two meeting was held on March 22, 1994. On April 5, 1994,

after the County failed to issue the Step 2 decision within the ten (10) day period provided for by contract, the Union appealed the grievance to Step Three. (Union Ex. No. 9). Thereafter, Grievance 94-08 did not appear on a Step Three agenda submitted to the County by the Union until April 16, 1996.

On January 30, 1996, three individual grievances filed in 1992, 1993 and 1994, protesting the County's unilateral change in the scheduled hours of work of employees in the Sewer Maintenance Department without first obtaining the agreement of the Union were heard at Step Three. On February 9, 1996, the Hearing Officer rendered his decision sustaining the grievances based upon a "well ensconced, well utilized past practice followed diligently by the parties." (U.L.P. Petition No. 199, Attach. No. 3)

On April 8, 1996, Grievance Chairperson, Mary Lou Griffith, sent a memo to Personnel Director Steele to which a copy of the Hearing Officer's decision was attached. The memo provides, in relevant part:

This sustained decision would also cover grievance 1607/94-08. Please advise when the Assessment Employees will be returned to their previous hours of work. Your prompt attention to this matter will be appreciated. (Union Ex. No. 25)

On April 16, 1996, Grievance Chairperson Griffith sent an E-Mail and a confirming memo to Employee Relations Representative, James Doctson, setting forth the grievances the Union wanted scheduled for the Step Three hearing on April 25, 1996. Included in the list was Grievance 94-08. (Union Ex. No. 30 and 31, respectively)

When, according to the unrefuted testimony of Chairperson Griffith, Mr. Doctson was unwilling to hear Grievance 94-08 at the April 25th hearing, the Union moved it to the Step Three agenda for June 5, 1996. (Union Ex. No. 33) By memo to Mr. Doctson dated May 9, 1996, Ms. Griffith confirmed the agendas for five future Step Three meetings scheduled in May and June, 1996. Included in the agenda for June 5th

was Grievance 94-08. (Union Ex. No. 39) Chairperson Griffith testified, with your contradiction, that the County, through its representative, Employee Relations Officer Doctson, was again unwilling to hear Grievance 94-08 on June 5, 1996. (Transcript @ pgs. 39 and 40)

Not having received a response to her memo of April 8, 1996, to Personnel Director Steele, Chairperson Griffith sent a second memo dated May 1, 1996, again requesting the County to return the Assessment employees in the Finance Department to their previous hours of work based upon the Hearing Officer's decision in the Sewer Department grievances. Ms. Griffith subsequently added the following handwritten comment to the bottom of the memo: "6/5/96 gave info. to Vance Sulsky. He will handle." (Union Ex. No. 36)

On June 13, 1996, Vance Sulsky, Esquire, Council 81 Representative, wrote to Eric Episcopo, Esquire, of the County Law Department, requesting that the Assessment Division Employees be returned their previous work hours. The following documents were attached to his request:

1. The notice dated January 6, 1994, from Director Nutter to the Assessment Division employees informing them of the change in hours;
2. The resulting grievance filed on January 14, 1994, and the subsequent appeal to Step Three;
3. A letter dated January 15, 1994, from Local 1607 President, Richard Krett, to Director Nutter objecting to the revised work schedule;
4. A memo dated April 16, 1979, from then Employee Relations Officer, William Spenla, to all County Row Officers, advising them that all shift changes must be approved by the Union pursuant to a decision issued by the Personnel Review Board on March 27, 1979;

5. The Step Three Decision resolving the Sewer Department Grievances;
and,
6. Copies of Ms. Griffith's memos of April 8, 1996 and May 1, 1996, to
Director Steele requesting that the Assessment employees be
returned to their previous work schedules. (County Ex. No. 7)

Whether the County responded to Mr. Sulsky's letter is not known.

ISSUE

Whether the County violated Section 1307(a)(5) of the Public Employment Relations Act, 19 DeL.C. Chapter 13 (1994), by refusing to schedule the Finance Department grievance for a Step Three hearing?

PRINCIPAL POSITIONS OF THE PARTIES

UNION: The Union maintains the County's refusal to schedule Grievance 94-08 for a Step Three meeting is but one instance of the County's continuing strategy to destroy the effectiveness of the grievance procedure and, thereby, the ability of the Union to effectively represent the bargaining unit employees.

The Union alleges the County has routinely failed to schedule grievances submitted by the Union for Step Three, to permit the substitution of other grievances and to appoint and/or reappoint a Step Three Hearing Officer. The County's conduct has resulted in a growing backlog of unresolved grievances forcing the Union to abandon its practice of scheduling Step Three grievances in chronological order and to prioritize outstanding grievances in the following order: 1) discharge grievances; 2) job classification grievances involving rates of pay; and 3) all other grievances. Despite its efforts, the current backlog includes two hundred unresolved grievances awaiting a Step Three hearing.

COUNTY: The County denies refusing to hear Grievance 94-08 at Step Three. The County construes the issue in its narrowest terms and, therefore, argues that the only relevant evidence is that which directly bears upon the scheduling of Grievance 94-08 for a Step Three hearing.

The County maintains that the status of Grievance 94-08 results from the mounting backlog of grievances and is no different from that of other grievances currently awaiting a Step Three hearing.

The County points out that since it was first appealed to Step Three on April 5, 1996, Grievance 94-08 was not included on any Step Three agenda presented by the Union until April 16, 1996. The County attributes the Union's failure to request a Step Three meeting for Grievance 94-08 in part to the turnover in the position of Grievance Chairperson and the Union's unilateral decision to prioritize grievances with Grievance 94-08 being in the lowest priority group. The County further maintains that as evidenced by Union Exhibit No. 36, Chairperson Griffith elected to turn Grievance 94-08 over to District Council 81 Representative, Vance Sulsky, for resolution which effectively removed from the formal grievance procedure.

The County also relies upon the absence of any documentation confirming its alleged refusal to schedule Grievance 94-08 for Step Three as evidence that it has not violated Section 1307(a)(5), as alleged.

DISCUSSION

The only witness to testify at the hearing of March 14, 1997, was the current Chairperson of the Union's Grievance Committee, Mary Lou Griffith. Ms. Griffith's direct testimony primarily concerned the fifty-four Union Exhibits, many of which were admitted over the County's objection that the only relevant evidence is that which directly pertains to the processing of Grievance 94-08 to Step Three. For the following reasons, the County's argument is misplaced.

The importance attached to the grievance procedure by the legislature is illustrated not only by its inclusion within Section 1302(q), of the Act, which expressly sets forth those subjects which constitute mandatory subjects of bargaining to which the duty to bargain in good faith attaches, but also Section 1313(c), which provides:

The public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.

In addressing the role of the grievance procedure, the PERB determined that:

The grievance procedure lies at the heart of the continuous collective bargaining obligation and constitutes the primary vehicle by which the parties' agreement is defined and refined during its term. For the agreement as a whole to have real meaning, it is incumbent on the parties to administer the grievance process in accordance with the contractual terms.

Indian River Ed. Ass'n., v. Bd. of Ed., U.L.P. No. 90-09-053 (1990) PERB Dec. Binder I, pg. 674.

The record in this matter documents a troublesome history of the County's unilaterally deleting grievances from the Step Three agendas submitted by the Union with relatively short notice or, at times, no notice at all and without an adequate reason for doing so and not permitting the substitution of replacement grievances.¹

¹See Union Exhibits 10; 14 & 15; 20, 24 & 26-35; 40; 42; 43; 44; 48 & 49; 52; & 53.

The operative provision of the grievance procedure language set forth in the collective bargaining agreement between AFSCME and the County provides:

(16) STEP THREE: (Hearing Officer)

(a) If the decision of the Chief Administrative Officer or Acting Chief Administrative Officer and Director of Personnel or Acting Director of Personnel shall be unsatisfactory, the Union shall have the right, through the Chairperson of the Grievance Committee, to appeal to the Step Three Hearing Officer for a hearing of the case. Request for such a hearing before the Hearing Officer must be made to the Director of Personnel or Acting Director of Personnel in writing, with a copy to the Hearing Officer within ten (10) working days after the decision has been submitted by the Chief Administrative Officer or Acting Chief Administrative Officer and Director of Personnel or Acting Director of Personnel to the Union in Step Two of the Grievance Procedure. The Hearing Officer shall meet monthly, if necessary, to hear the appealed grievances submitted at least one (1) week prior to the hearing date.

The meaning of Section 16(a), is clear and unambiguous. Grievances appealed to Step Three by the Union at least one (1) week prior to the scheduled hearing date will be heard by the Hearing Officer who will be available to meet monthly, if necessary. The Union is the proactive force in appealing grievances to Step Three.

The contract language does not authorize management to control which grievances will be heard at Step Three or when they will be heard. Once the grievances are identified by the Union and the date for the Step Three hearing is confirmed with the Hearing Officer it is the County's responsibility to attend the hearing prepared to defend its position. While unforeseen circumstances will periodically arise which affect the scheduling of a particular grievance such instances should be the exception rather than the rule.

Union Exhibits 37, 38, 39, 41, 42 and 43 document the difficulties experienced by the Union when scheduling grievances for Step Three. On May 1, 1996, May 2, 1996, May 9, 1996, and May 29, 1996, Chairperson Griffith notified and confirmed with Employee Relations Officer Doctson the agendas for four (4) Step Three meetings scheduled in April and May. Each communication included Grievance 94-77 (PCQ) on the agenda for June 4, 1996. (Union Exhibits 37, 38, 39 and 41)

According to the unrefuted testimony of Ms. Griffith, Mr. Doctson unilaterally deleted some of the designated grievances from the agendas, including Grievance 94-77. In response to Ms. Griffith's protest on June 3, 1996, the day before the scheduled Step Three meeting, and her request to know the reason why (Union Exhibit 42), Mr. Doctson responded that the administrator who conducted the PCQ was no longer employed by the County and the current department managers were unable to consider the merits of the grievance because they "had other priorities." Considering the fact that the County was first advised on May 1, 1996, that Grievance 94-77 was scheduled for the Step Three hearing on June 4, 1997, the County's "other priorities" excuse is unacceptable.

In addition to further delaying the processing of a three year old grievance, Mr. Doctson's inability or unwillingness to require management's cooperation and participation served only to underscore the County's disregard of its contractual and statutory obligation to process grievances in accord with the negotiated grievance procedure.

On April 8, 1996, Chairperson Griffith wrote directly to Personnel Director Steele attempting to resolve grievance 94-08. (Union Ex. No. 25) After receiving no response, she wrote again on May 1, 1996. (Union Ex. No. 36) Again receiving no response, she enlisted the support of District Council 81 Representative, Vance Sulsky, who wrote to the County Law Department on June 13, 1996, attempting to

informally resolve Grievance 94-08. As of the date of the ULP hearing on March 14, 1997, Grievance 94-08 had yet to be heard at Step Three and remained unresolved.

The Union is not required to prove its claim by an express verbal or written refusal by the County to hear Grievance 94-08 at Step Three. The County cannot cause or significantly contribute to the breakdown in the grievance procedure and then rely on the resulting backlog as the reason for its failure to hear a specific grievance at Step Three.

Nor do I find persuasive the County's argument that because the Union decides which grievances are to be heard at Step Three the County cannot be held accountable for the delay in processing Grievance 94-08. On the one hand, the County acknowledges that it is the Union's responsibility to submit those grievances which it desires to be heard at Step Three. On the other hand, the evidence establishes that the County has systematically not only refused to hear specific grievances but also refused to permit the substitution of other grievances in their place.

It is noted for the record that the County's argument that the Union is at least equally responsible for the breakdown of the grievance procedure, is unsupported by the evidence of record.

CONCLUSIONS OF LAW

1. New Castle County is a public employer within the meaning of Section 1302(m) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

2. The American Federation of State, County and Municipal Employees is an employee organization within the meaning Section 1302(h) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

3. The American Federation of State, County and Municipal Employees is the exclusive representative of certain of the County's employees within the meaning of Section 1302(i) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

4. By refusing to schedule Grievance 94-08 for a Step Three Hearing, the County violated Section 1307(a)(5) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), as alleged.

WHEREFORE, pursuant to 19 Del.C. Section 1306(h)(2), New Castle County is ordered to:

A. Cease and desist from failing to bargain in good faith by engaging in conduct which has and continues to effectively interfere with the timely processing of grievances in accord with the negotiated grievance procedure.

B. Take the following affirmative actions:

1. Hold a Step Three hearing for Grievance 94-08 within thirty (30) calendar days from the date of this Order;
2. Within ten (10) calendar days from the date of receipt of this decision, post the attached Notice of Determination for a period of thirty (30) days in all areas where notices affecting bargaining unit employees are normally posted.
3. Notify the Public Employment Relations Board within forty-five (45) calendar days from the date of this Order of the steps taken to comply with the Order.

IT IS SO ORDERED.

/s/Charles D. Long, Jr.

Charles D. Long, Jr., Executive Director
Delaware Public Employment Relations Board

DATED: 22 April 1997